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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re J.M. et al., Persons Coming Under the Juvenile Court Law.	
SAN DIEGO COUNTY HEALTH AND HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. Rebekah P. et al., Defendants and Appellants.	D057228 (Super. Ct. No. NJ14022)

APPEAL from a judgment of the Superior Court of San Diego County, Ronald F. Frazier, Judge. Affirmed.

Mother Rebekah P. and father Sergio M., Sr. (Father), appeal from the judgment terminating their parental rights to their seven-year-old daughter, J.M.; their six-year-old son, Daniel; and their four-year-old son, Sergio, Jr. (Sergio). Rebekah contends that the court erred in declining to apply the beneficial relationship exception to termination of

her parental rights (Welf. & Inst. Code, § 366.26, subd. (c)(1)(B)(i)).[1] Father contends that the court erred by summarily denying his section 388 petition, in which he sought to have the children placed with him or, in the alternative, transitioned into his care, and that the San Diego County Health and Human Services Agency (the Agency) failed to conduct a diligent search for him, thereby depriving him of his due process right to notice of the proceedings. Father also contends that the Agency's adoption assessment was inadequate, and that the court erred in finding the children to be adoptable. Rebekah and Father join in each other's contentions. We affirm the judgment.

I

BACKGROUND

In September 2008, the Agency filed dependency petitions alleging that Rebekah had physically abused Sergio, leaving bruises on his abdomen, torso and back; a large bruise on his hip; and extensive bruising on his arms. Rebekah admitted that she struck Sergio with her fist, and said that she hit Sergio because "he looks like his father."[2] The children were detained in foster homes.

At the time the petitions were filed, Father's whereabouts were unknown. Rebekah provided the social worker with Father's birth date and said that he was an undocumented immigrant, did not have a social security number, and would not tell

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1 All further statutory references are to the Welfare and Institutions Code unless otherwise specified.

2 Just before the petitions were filed, Sergio tested presumptively positive for amphetamines and methamphetamines.

Rebekah his address. Rebekah believed that Father was in Las Vegas, Nevada. She said that she had separated from Father because he hit, punched and kicked Sergio. Rebekah said that Father also hit her. According to Rebekah, Father left their home in February 2008, and left California in May. At the September 4 detention hearing, the court ordered the Agency to search for Father.

On September 9, 2008, Rebekah was arrested for inflicting corporal injury on a child (Sergio), a felony (Pen. Code, § 273d, subd. (a)). She pleaded guilty, was placed on probation and remained incarcerated until January 21, 2009. On October 14, 2008, the court entered true findings on the petitions and ordered the children placed in foster care. The court found that the Agency had not made reasonable efforts to find Father and ordered the Agency to continue its search.

In March 2009, the Agency filed a report stating that it had not found Father after having searched for him in California and Nevada. The search in Nevada consisted of inquiries to the Clark County Sheriff's Department and Clark County Family Services, neither of which had any record of Father, and to the Las Vegas Metro Police Department, which did not respond. In the same report, there were indications that Rebekah knew Father's telephone number. The Agency stated that Rebekah said "that she has telephoned [Father] in an attempt to allow contact with the children" but Father did "not want anything to do with the children and will not contact the Agency because he is an undocumented immigrant from Mexico." The Agency also reported that it had "instructed [Rebekah] to discontinue her three-way telephone calls to [Father] during her

contact with the children." On March 24, the court found that notice had been given as required by law.[3]

In April 2009, Daniel and Sergio were placed in a concurrent planning foster home. In July, J.M. was placed in the same home. In September, the Agency completed another search for Father. The social worker reported that she had spoken with Rebekah about Father's whereabouts on several occasions. Rebekah said that she did not know where he was and that she had not had any contact with him for a significant period of time.

In August 2009, the Agency reported that it had attempted to contact Father by telephone. On October 8, social worker Jennifer Williams received a message from Father.[4] In the message, Father said that he had left Rebekah and the children about a year ago due to problems in his relationship with Rebekah. According to Williams, Father "stated that he thought that [Rebekah] was doing all the services that she needed to." Father said that he was willing to do whatever was necessary to secure the children's return. He provided his telephone number and his address in Las Vegas. On October 9, Williams sent Father a letter notifying him that the children were dependents of the juvenile court and asking him to call her to set up visits and to discuss reunification.

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[3] The only subject of the March 24 hearing was Rebekah's request for a contested six-month review hearing. At the request of the Agency's counsel, the court found that "notice has been given as required by law." There was no mention of Father or any search efforts.

[4] Father testified that he left a message for Williams in January 2009, but Williams never called back. Williams testified that she was assigned to this case in April.

Williams advised Father that he had a right to appointed counsel and enclosed a form to request appointment of counsel.

At the November 17, 2009, 12-month review hearing, the court terminated Rebekah's reunification services and set a section 366.26 hearing for March 16, 2010. On November 19, 2009, the court clerk sent copies of the November 17 minute orders to Father at his Las Vegas address. On December 15, social worker Julie Walker met with Father. Father said that he had not come forward earlier or made any attempt to contact the children because he thought that they were with Rebekah.

On December 15, 2009, the court received Father's completed form requesting appointed counsel. On December 31, Father appeared in court for the first time and requested visitation. He gave the court a mailing address in Henderson, Nevada. The court appointed counsel, found that Father was a presumed father, and ordered that he have no visits pending a January 14, 2010 hearing. On January 14, the court reiterated its no visitation order and set a hearing for March 10. On March 10, the court found that visitation with Father would be detrimental to the children.

On March 16, 2010, the court continued the section 366.26 hearing to April 14. On April 14, Father filed his section 388 petition. The court summarily denied the petition and terminated parental rights.

II

DISCUSSION

A

Father Forfeited His Right to Challenge The Agency's Search Efforts

"[T]he failure to give notice carries . . . grave consequences in the dependency court, where parent-child ties may be severed forever. Social services agencies, invested with a public trust and acting as temporary custodians of dependent minors, are bound by law to make every reasonable effort in attempting to inform parents of all hearings. They must leave no stone unturned." (*In re DeJohn B.* (2000) 84 Cal.App.4th 100, 102 (*DeJohn B.*).) Thus, where a social services agency makes no attempt to advise a parent of dependency proceedings, the failure to give notice is not harmless. A lack of notice cannot be justified by the assertion that "the parent was unworthy and, thus, was not prejudiced." (*Ibid*.) Further, "the minors' interest in stability [does not] trump[] the parent's constitutional rights." (*Ibid*.)

DeJohn B., supra, 84 Cal.App.4th 100, on which Father relies, is distinguishable from the instant case. In *DeJohn B.,* the mother's whereabouts were unknown at the time the child was detained. (*Id*. at p. 103.) The Orange County Social Services Agency (SSA) had only her name and last known address in Long Beach. (*Id.* at pp. 103-104.) SSA sent a telegram to that address with information about the detention hearing, and mailed a copy of the petition and notice of hearing to the same address, and to two

addresses in Bellflower. (*Id*. at p. 103.) The father told the social worker that the mother had abandoned the children six or eight months earlier, and that the mother had spoken with him only twice during that period. He believed she might be living on the street. (*Id*. at p. 103.) There was no indication that SSA asked the father about the mother's relatives, friends or others who might know her whereabouts.

At the six-month review hearing, the court set a section 366.26 hearing. SSA sent a notice to the Long Beach address, advising the mother of her right to petition for writ relief. One month later, SSA located the maternal grandmother and obtained the mother's address in Las Vegas. SSA sent a notice of the section 366.26 hearing to the Las Vegas address. SSA did not explain how it found the grandmother or why it had not located her sooner. The mother signed a receipt for the notice, contacted the social worker, and requested visitation. (*DeJohn B., supra,* 84 Cal.App.4th at p. 104.) The mother stated that she had left the children with her brother while she looked for a job, and the next day, the father took the children. (*Id*. at pp. 104-105.) The mother had searched for the children without success. (*Id*. at p. 105.) She stated, and the father confirmed, that he had concealed the children's location. (*Id*. at pp. 104-105.)

At the section 366.26 hearing, the court denied the mother's motion to set aside the six-month review findings, denied her section 388 motion, which sought the children's return or services, and terminated parental rights. (*DeJohn B., supra,* 84 Cal.App.4th at pp. 105-106.) The Court of Appeal reversed, stating that SSA had done nothing to find the mother and provide her with notice of the proceedings. (*Id*. at pp. 108, 110.)

Here, unlike the situation in *DeJohn B.*, *supra,* 84 Cal.App.4th at page 100, Father knew early in the case that the children were in the dependency system. According to his own testimony, he was aware of the dependency proceedings in January 2009—approximately three months before the six-month review hearing and approximately 10 months before the court set the section 366.26 hearing. In addition, unlike the mother in *DeJohn B.*, Father delayed in asking for visits. Rather than requesting visitation when he learned of the dependency, he waited nearly a year, until more than a month after the court had set the section 366.26 hearing . Moreover, Father never moved to set aside the findings based on lack of notice, as the mother in *DeJohn B.* did.

Here, the Agency's search was inadequate. There is no indication in the record that the Agency "did the obvious" (*DeJohn B.*, *supra,* 84 Cal.App.4th at p. at p. 108) by asking Rebekah for Father's telephone number when she said that she had telephoned him. Equally obvious resources that the Agency failed to contact are the Nevada counterparts of entities that the Agency did contact in California, such as the Department of Motor Vehicles. The Agency's search did not comply with its " 'constitutional responsibility to use due diligence to notify absent parents before depriving them of that "most basic of civil rights"—the care, custody, and companionship of their children. [Citation.]' [Citation.]" (*Id*. at pp. 109-110.)

However, Father has forfeited his right to challenge both the Agency's search efforts and the court's finding that notice was given as required by law. As noted above,

he did virtually nothing for nearly a year after learning that the children were involved in the dependency system. Then, at the hearings on December 31, 2009, and January 14, 2010, Father's trial counsel stated that he intended to file a section 388 petition raising notice issues. However, the section 388 petition, filed on April 14, raised no such issues. Father never asserted that he had not been provided with proper notice or that the Agency had not conducted a diligent search for him. Because Father never challenged the Agency's search efforts in the juvenile court, and never asserted that he had not been provided proper notice, he has forfeited his right to raise those issues on appeal. (*In re Gilberto M.* (1992) 6 Cal.App.4th 1194, 1197-1200 [by participating in the six-month review hearing, at which the court set a § 366.26 hearing, and failing to raise notice defect in juvenile court, appellant forfeited his right to raise the issue on appeal from the judgment terminating parental rights].) Thus, under the particular circumstances of this case, we must reject Father's challenge to the Agency's search efforts.

B

The Court Did Not Abuse Its Discretion
In Summarily Denying Father's Section 388 Petition

Section 388 allows the juvenile court to modify an order if a party establishes, by a preponderance of the evidence, that changed circumstances exist and that the proposed change would promote the child's best interests. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.) To obtain a hearing on a section 388 petition, the parent must make a prima facie showing as to both of these elements. (*Ibid.*; *In re Justice P.* (2004) 123 Cal.App.4th 181, 188.) The petition should be liberally construed in favor of

granting a hearing, but "[t]he prima facie requirement is not met unless the facts alleged, if supported by evidence given credit at the hearing, would sustain a favorable decision on the petition." (*In re Zachary G., supra,* at p. 806.) We review the summary denial of a section 388 petition for an abuse of discretion. (*Id.* at p. 808; *In re Jeremy W.* (1992) 3 Cal.App.4th 1407, 1413; *In re Aljamie D.* (2000) 84 Cal.App.4th 424, 431, 433.)

In his section 388 petition, Father requested that the court change its order terminating Rebekah's services and setting the section 366.26 hearing, and place the children with him or, in the alternative, transition them into his care. As changed circumstances or new evidence, Father alleged that he had "re-inserted himself into the children's lives[,] established himself financially and [was] able to take and care for the minors." The petition alleged that the proposed change would be in the children's best interests because "[t]he children know and love their father and should be allowed the opportunity to live with him and be raised with their family, extended and otherwise."

In denying a hearing on the section 388 petition, the court found that Father had not made a "prima facie showing of either change of circumstances or that his reentry into the children's lives would be in their best interest." The court also referred to its "prior ruling that denied [Father] any visitation rights and maintained a no contact order as further evidence of why there is no prima facie case and why it's not in the best interest of the children." The court's prior "no visitation" orders were based on Father's lack of contact with the children, which made him a virtual stranger to them; his failure to attempt contact with the children; the fact that Father had committed acts of domestic abuse in the presence of the children; the children's therapists' recommendations against

visitation; and the fact that the children had stated that they did not want to participate in visits with Father.[5]

In his brief, Father repeats the allegations of his petition, but does not expressly assert that the court erred by finding that he failed to make a prima facie showing of change of circumstances or best interests. Rather, he confines his argument to the notice issue, discussed above, although he failed to raise the notice issue in his section 388 petition. In any case, the juvenile court did not abuse its discretion by finding that Father had not made a prima facie showing of changed circumstances or best interests, as he alleged in his petition. As to the alleged change of circumstances, it was uncontradicted that Father had not seen the children for approximately two years. Thus, he had not in fact "re-inserted himself into the children's lives." His financial ability to take care of them is not, by itself, a sufficient change of circumstances. As to the children's best interests, it was uncontradicted that the children's therapists believed that Father was a stranger to them and recommended against contact, and the children strongly expressed that they did not want to see him. Further, the case was past the reunification phase; the focus was now on the children's need for permanency and stability. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) There was thus a rebuttable presumption that continued foster care was in their best interests. (*Ibid.*) Father did not overcome the presumption by simply alleging that the children should have the opportunity to live with Father and have contact with his extended family.

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5 The children had not seen Father for nearly two years.

The court did not abuse its discretion by summarily denying the section 388 petition.

C

The Agency's Adoption Assessment Was Not Deficient
And the Court Did Not Err by Finding the Children to be Adoptable

The Agency was required to prepare an adoption assessment with an evaluation of the children's "medical, developmental, scholastic, mental, and emotional status" and an analysis of the likelihood that they would be adopted. (§ 366.21, subd. (i)(1)(C), (G).) Adoptability is determined "[o]n the basis of this assessment and 'any other relevant evidence.' " (*In re Josue G.* (2003) 106 Cal.App.4th 725, 732, quoting § 366.26, subd. (c)(1).) The Agency bore the burden of proving adoptability. (*In re Gregory A.* (2005) 126 Cal.App.4th 1554, 1557, 1559-1561.) "Although a finding of adoptability must be supported by clear and convincing evidence, it is nevertheless a low threshold: The court must merely determine that it is 'likely' that the child will be adopted within a reasonable time. [Citations.]" (*In re K.B.* (2009) 173 Cal.App.4th 1275, 1292.) A child's psychological, behavioral and developmental problems may make it more difficult to find adoptive homes, but do not necessarily prevent an adoptability finding. (*In re Lukas B.* (2000) 79 Cal.App.4th 1145, 1154; *In re Helen W.* (2007) 150 Cal.App.4th 71, 75, 79; *In re Jennilee T.* (1992) 3 Cal.App.4th 212, 224-225.)

Father contends that the assessment did not include information about J.M.'s developmental delays; Daniel's expressive language disorder, possible fine motor skill deficits, mild anxiety and speech delays; or Sergio's fine motor skill deficits, below

average language skills, hand tremor, excessive drooling, aggression and increasingly difficult behavior.

Father did not challenge the adequacy of the adoption assessment in the juvenile court, thus forfeiting his right to raise this contention on appeal. (*In re Brian P.* (2002) 99 Cal.App.4th 616, 622-623.) Further, the assessment included the information that Father claims was missing.[6]

The assessment stated that the children were generally adoptable because they were young and healthy, and had no major medical or developmental issues. Their caregivers wanted to adopt them. In addition, there were 22 other families in San Diego County, with approved home studies, that would be potential matches for children with J.M.'s and Daniel's characteristics. For Sergio, there were 27 such families. There were 36 families outside of San Diego County, with approved home studies, that were willing to adopt a sibling set with these children's characteristics.

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6 The March 2010 assessment set forth the results of the children's developmental evaluations. J.M.'s October 2008 evaluation cited her inability to take turns while playing board games, to define words, to identify opposites and to understand prepositions. She had a tutor, but did not require special education. Daniel's January 2009 evaluation stated that he had an expressive language disorder, possible fine motor skill deficits and mild anxiety. The evaluation recommended a speech and language evaluation and attendance at a preschool that offered kindergarten readiness skills. By the time the assessment was written, Daniel was in kindergarten. He received speech therapy at school and his speech had improved greatly. Finally, Sergio's February 2009 evaluation noted that he had below average fine motor skills with crayons and paper, average fine motor skills with puzzles and blocks, below average language skills, a slight hand tremor, excessive drooling and a tendency to become upset when redirected, and emotionally overwhelmed when over-stimulated. Speech therapy had greatly improved Sergio's speech. The assessment noted that Sergio had been very aggressive when he began therapy, but that his behavior had greatly improved.

The court found by clear and convincing evidence that the children were both generally and specifically adoptable.[7] Construing the record most favorably to the judgment (*In re Josue G., supra,* 106 Cal.App.4th at p. 732), there is substantial evidence to support this finding (*In re Lukas B., supra,* 79 Cal.App.4th at p. 1154).

D

The Court Did Not Err in Refusing to Apply
The Beneficial Relationship Exception
To Termination of Rebekah's Parental Rights

If a dependent child is adoptable, the juvenile court must terminate parental rights at the section 366.26 hearing unless the parent proves the existence of a statutory exception. (§ 366.26, subd. (c)(1); *In re Helen W., supra,* 150 Cal.App.4th at p. 80.) One such exception exists if "[t]he parent[has] maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).) A beneficial relationship is one that "promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) The existence of this relationship is determined by taking into consideration "[t]he age of the child, the portion of the child's life spent in the parent's custody, the 'positive' or 'negative' effect of interaction between parent and child, and the child's particular needs. . . ." (*Id.*

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[7] A finding of general adoptability "focuses on the minor, e.g., whether the minor's age, physical condition, and emotional state make it difficult to find a person willing to adopt the minor." (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649, italics omitted.) A child who is not generally adoptable may be specifically adoptable, that is, adoptable "because a prospective adoptive family has been identified as willing to adopt the child." (*Id.* at p. 1650.)

at p. 576.) Examining the evidence in the light most favorable to the judgment, we conclude that there is substantial evidence to support the court's findings that "although a parental bond exists with respect to [Rebekah], the benefit of adoption outweighs that parental bond." (*Id*. at pp. 576-577; *In re Cristella C*. (1992) 6 Cal.App.4th 1363, 1373.)[8]

J.M., Daniel and Sergio were detained when they were nearly five years old, four years old and two and one-half years old, respectively. At the time of the section 366.26 hearing, they were six and one-half years old, five and one-half years old and four years old, respectively. They had been out of Rebekah's care for one year and seven months. Daniel and Sergio had lived with their caregivers for nearly a year, and J.M. had lived with the family for nine months. The children were thriving in their placement and felt safe and secure. They were very attached to their caregivers, viewed them as their parents, and wanted to remain in their home.

The children and Rebekah loved each other and the children had fun at visits. However, the children generally had no trouble separating from Rebekah when visits ended, and J.M. and Daniel said that they wanted to stop visiting with Rebekah.[9] During visits, Rebekah had difficulty paying attention to all three children, became easily

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8 The court did not make an express finding as to whether Rebekah had maintained regular visitation and contact with the children. The record shows that Rebekah was generally consistent in her supervised visits over the course of the dependency. She had one visit while she was incarcerated. Her visits were always supervised. Rebekah did not maintain consistent telephone contact with the children, and at the time of the section 366.26 hearing, more than a month had passed since the last telephone contact.

9 Daniel also said that he wanted to continue visiting.

frustrated and failed to set limits. Rebekah continued to put her needs before the children's needs and had not acknowledged the protective issues that brought the children into the dependency system.

There is substantial evidence to support the conclusions that the children did not have "a substantial, positive emotional attachment" to Rebekah of the kind that would outweigh the well-being that they would gain in a permanent, adoptive home, and that they would not be greatly harmed by the severance of the relationship with Rebekah. (*In re Autumn H., supra*, 27 Cal.App.4th at p. 575.) There is thus substantial evidence to support the court's finding that the beneficial relationship exception does not apply.

DISPOSITION

The judgment is affirmed.

AARON, J.

WE CONCUR:

McDONALD, Acting P. J.

IRION, J.